Washington University Law Review

Volume 63 | Issue 3

January 1985

A Statutory Proposal Protecting Employment Expectations of a Close Corporation's Minority Shareholders

Russell D. Phillips Jr.
Washington University School of Law

A STATUTORY PROPOSAL PROTECTING EMPLOYMENT EXPECTATIONS OF A CLOSE CORPORATION'S MINORITY SHAREHOLDERS

So I returned and considered all the oppressions that are done under the sun: and behold the tears of such as were oppressed, and they had no comforter; and on the side of their oppressors there was power, but they had no comforter.[1]

In a close corporation,[2] majority shareholders[3] have the capacity to squeeze-out[4] one or more minority shareholders from the corporation.[5] The minority shareholder has few available remedies to counter majority

---

1. *Ecclesiastes* 4:1.

2. A small number of shareholders typically own and manage a close corporation. The shares of the corporation generally are not traded in the securities market. *See* BLACK'S LAW DICTIONARY 308 (rev. 5th ed. 1979).

The Delaware corporations statute defines a close corporation as a corporation whose certificate of incorporation (1) limits record ownership of its stock to not more than a specified number of persons, not exceeding thirty; (2) subjects all its issued stock to one or more statutorily permitted restrictions on transfer; and (3) prohibits the corporation from making a public offering of its stock under the federal Securities Act of 1933. DEL. CODE ANN. tit. 8, § 342 (1975).

In Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975), the court listed the following characteristics of a close corporation: "(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operation of the corporation." *Id.* at 586, 328 N.E.2d at 511.

Professor O'Neal defines the term "close corporation" as a "corporation whose shares are not generally traded in the securities markets." 1 F. O'NEAL, CLOSE CORPORATIONS § 1.02, at 3-4 (2d ed. 1970).

3. Commentators define the terms "majority" and "minority shareholders" as follows:

> [T]he terms "majority" and "minority" are used to distinguish those shareholders who possess the actual power to control the operations of the firm from those who do not. Although control is most often determined by the size of shareholdings, it does not depend upon 51% ownership. For example, control might be exercised by a nonmajority shareholder who has special skills upon which the business depends.

Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem,* 63 VA. L. REV. 1, 5 n.7 (1977).

4. The term "squeeze-out" describes the method by which some of the owners in a business enterprise utilize strategic position, inside information, power of control, or legal devices to eliminate one or more owners or participants from the enterprise. *See* F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS § 1.01, at 1 (1975 & Supp. 1984) [hereinafter cited as F. O'NEAL]. The terms "freeze-out" and "squeeze-out" are synonyms. 1 H. MARSH, MARSH'S CALIFORNIA CORPORATION LAW § 10.41 (2d ed. 1981).

5. As a general proposition, the persons holding a majority of the voting shares of a corporation have the power to elect all the corporate directors. The directors determine corporate policy, select corporate officers, hire employees, and supervise the operation of the corporation. Majority interests can deprive minority interests of any voice in the operation of the business. F. O'NEAL, *supra* note 4, § 1.03, at 3.

shareholder oppression.[6] If he is dissatisfied with his position in the corporation, the minority shareholder may desire to sell his stock in the corporation.[7] Unlike shares in a public corporation that are traded regularly, however, minority shares in a close corporation may be unmarketable[8] because potential purchasers often hesitate to assume an inferior position in a close corporation.[9] Because they already enjoy control, the majority shareholders would gain little from buying out the minority shareholder.[10] Thus, to liquidate his investment, the minority shareholder may be forced to accept a majority shareholder's offer for the stock that is substantially below its true market value.[11]

A common squeeze-out technique is to discharge the minority shareholder from corporate employment.[12] The minority shareholder in a close corporation often expects the corporation to employ him on a full-

6. A number of states have enacted statutes authorizing dissolution as a remedy for minority shareholders. *See infra* note 77 and accompanying text.

Some courts consider dissolution to be drastic, however, and hesitate to grant such relief. *See, e.g.*, Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 274 (Alaska 1980); Notzke v. Art Gallery, Inc., 84 Ill. App. 3d 294, 300, 405 N.E.2d 839, 844 (1980).

Minority shareholders may preclude relief by failing to insist upon a shareholders' agreement or appropriate charter or bylaw provisions. Minority shareholders may be unaware of the potential risks involved, or they may lack the bargaining power necessary to negotiate for protection. *See* F. O'NEAL, *supra* note 4, § 9.03, at 582.

7. The minority shareholder's alternative, in effect, is to abandon his investment. *See* Hetherington, *Special Characteristics, Problems, and Needs of the Close Corporation*, 1969 U. ILL. L.F. 1, 29; Note, Meiselman v. Meiselman: *"Reasonable Expectations" Determine Minority Shareholders' Rights*, 62 N.C.L. REV. 999, 1005 (1984) [hereinafter cited as *Rights of Minority Shareholders*].

8. *See, e.g.*, Fox v. 7L Bar Ranch Co., 198 Mont. 201, 645 P.2d 929 (1982) (to prevent bank from calling in its loan to the minority shareholder on the assertion his stock had no value for collateral purposes, another shareholder had to assure the bank he would purchase the shares if the loan were foreclosed); Meiselman v. Meiselman, 58 N.C. App. 758, 295 S.E.2d 249 (1982), *modified*, 309 N.C. 279, 307 S.E.2d 551 (1983) (court deemed the minority shareholder's interest, having a book value between three and seven million dollars, worthless as a producer of income).

9. *See* Exadaktilos v. Cinnaminson Realty, 167 N.J. Super. 141, 152, 400 A.2d 554, 560 (Law. Div. 1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994, *cert. denied*, 85 N.J. 112, 425 A.2d 273 (App. Div. 1980). *See generally* F. O'NEAL, *supra* note 4, § 2.15, at 42; Note, *Involuntary Dissolution of Close Corporations for Mistreatment of Minority Shareholders*, 60 WASH. U.L.Q. 1119, 1121 (1982) [hereinafter cited as *Involuntary Dissolution*].

10. The only benefit that the majority can gain by purchasing the minority's interest is the portion of earnings attributable to that interest. *See* Hetherington & Dooley, *supra* note 3, at 6.

11. *See, e.g.*, Baker v. Commercial Body Builders, Inc., 264 Or. 614, 637, 507 P.2d 387, 398 (1973) (it is common knowledge that the minority interest is worth considerably less than book value).

12. *See, e.g.*, Crawford v. Mindell, 57 Md. App. 111, 469 A.2d 454 (1984) (chairman of board discharged minority shareholders); Miller v. Winshall, 9 Mass. App. 312, 400 N.E.2d 1306 (1980) (directors removed minority shareholder from position as president).

time basis.[13] He may invest all of his assets, expecting to live off the salary he receives from the corporation. If the corporation discharges him, the minority shareholder may lose his means of livelihood as well as the value of his investment in the corporation.[14]

Absent an express or implied employment contract, the minority shareholder-employee is subject to the employer's traditional right to discharge employees for any reason.[15] Unlike the employees in a majority of other industrialized nations,[16] private sector employees[17] in the United States generally lack protection from unjust discharge. Either the employee or the employer can terminate the employment at will.[18] Some courts have been sympathetic to the employee-at-will, creating exceptions to the employment-at-will rule.[19]

Part One of this Note examines various squeeze-out techniques. Part Two of this Note describes the historical development of the employment-at-will rule and provides an overview of the major judicially developed exceptions. Part Three discusses recent court cases offering protection to minority shareholders based on their reasonable expectations. Part Four proposes an involuntary dissolution and alternative relief statute that would create an exception to the employment-at-will rule for close corporation shareholder-employees and would enable courts to grant relief to minority shareholders. This Note concludes that the pro-

13. *See, e.g.*, O'Donnel v. Marine Repair Services, 530 F. Supp. 1199 (S.D.N.Y. 1982); Wilkes v. Springside Nursing Home, 370 Mass. 842, 353 N.E.2d 657 (1976).

14. *See, e.g.*, Keck v. Schumacher, 198 So. 2d 39 (Fla. Dist. Ct. App. 1967) (discharged shareholder left with no income for living expenses); Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983) (discharged employee deprived of salary, car, insurance, use of corporate credit cards, and participation in profit sharing trust).

15. *See* Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *rev'd on other grounds sub. nom.* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

16. For a discussion of foreign statutes protecting employees from unjust dismissal, see generally INTERNATIONAL HANDBOOK ON CONTRACTS OF EMPLOYMENT (C. Aronstein ed. 1976); Sherman, *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries,* 29 AM. J. COMP. L. 467, 506-11 (1981); Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute,* 62 VA. L. REV. 481, 508-19 (1976).

17. Federal civil service employees are protected under the Civil Service Reform Act of 1978, § 204(a), 5 U.S.C. § 7403 (1982). State government employees are also afforded a wide range of protections. *See* J. WEISBERGER, JOB SECURITY AND THE PUBLIC EMPLOYEES 9-19, 45-65 (2d ed. 1973).

18. To mitigate the impact of the employment-at-will rule, unions typically negotiate an agreement providing for dismissal only for just cause. For an example of such a clause, see Phillips Petroleum Co., 48 Lab. Arb. (BNA) 402, 403 (1967).

19. *See infra* notes 52-75 and accompanying text.

posed statute would effectively balance the interests of both minority and majority shareholders.

I. SQUEEZE-OUT CAUSES, TECHNIQUES, AND REMEDIES IN CLOSE CORPORATIONS

When an investor decides to become a shareholder in a close corporation, he usually assumes that during the life of the corporation the shareholders will determine the operation of the corporation.[20] The individual shareholders may regard themselves as partners with common control of the business.[21]

Not all close corporations, however, are harmoniously managed. Disagreement over corporate policy may arise for many different reasons, including greed and desire for power by one or more shareholders.[22] Disagreement over corporate policy may eventually lead to a squeeze-out of minority shareholders. Majority shareholders use various squeeze-out techniques, including withholding dividend payments on corporate stock,[23] voting the minority shareholder off the board of directors, and discharging the minority shareholder from corporate employment.[24]

---

20. *See* Davidian, *Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders,* 56 ST. JOHN'S L. REV. 24, 26 (1981); Hetherington & Dooley, *supra* note 3, at 2.

21. *See, e.g.,* Cressy v. Shannon Continental Corp., 177 Ind. App. 224, 228, 378 N.E.2d 941, 945 (1978) ("while parties incorporate to obtain the benefits of limited liability, perpetual existence of business entity or tax considerations accruing to the corporate form, they often expect to act and be treated as partners in their dealings among themselves").

22. *See* Frasier v. Trans-Western Land Corp., 210 Neb. 681, 316 N.W.2d 612 (1982) (greedy majority shareholders attempted to oust minority shareholders to realize greater profits). Disagreement may also occur for the following reasons: the existence of an inactive shareholder, *see* Schwartz v. Marien, 43 A.D.2d 307, 351 N.Y.S.2d 216 (1974); the death of a founder, *see In re* Radmon & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954); the existence of an autocratic controlling shareholder, *see* Crandall v. Conole, 230 F. Supp. 705 (E.D. Pa. 1964); the entry of a minority shareholder in a competing business, *see* Hyman v. Velsicol Corp., 342 Ill. App. 489, 97 N.E.2d 122 (1951); the failure to reduce the bargain to writing, *see* Lewis v. Compton, 416 So. 2d 1219 (Fla. App. 1982); and the occurrence of personality clashes, *see* Johnson v. Livingston Nursing Home, 282 Ala. 309, 211 So. 2d 151 (1968).

23. *See, e.g.,* Kohn v. Birmingham Realty, 352 So. 2d 834 (Ala. 1977); Alaska Plastics, Inc. v. Coppock, 621 P.2d 270 (Alaska 1980); Miller v. Magline Inc., 76 Mich. App. 284, 256 N.W.2d 761 (1977).

24. *See supra* note 12 and accompanying text. If a clause in the corporate charter or bylaws authorizes the corporation to purchase the shares of a holder who ceases to be an employee, removing the shareholder can be the first of two steps to eliminate him from the corporation. *See, e.g.,* Ketchum v. Green, 557 F.2d 1022 (3d Cir.), *cert. denied,* 434 U.S. 940 (1977); Keating v. B.B.D.O. Int'l, 438 F. Supp. 676 (S.D.N.Y. 1977).

Majority shareholders also can utilize state corporate code provisions to squeeze out minority shareholders. These provisions may enable a board of directors: 1) to alter shareholder rights for a

The principles of majority rule[25] and the business judgment rule[26] have often prevented the minority shareholder from obtaining effective relief from these tactics. As a result of this hardship, some states have enacted legislation designed to protect the interests of the minority shareholder.[27]

---

class of shares; *see, e.g.*, CAL. CORP. CODE § 900 (Deering 1977), N.Y. BUS. CORP. LAW § 804 (Consol. 1983); *see also* McIntosh v. Magna Systems, Inc., 539 F. Supp. 1185 (N.D. Ill. 1982) (directors caused articles of incorporation to be amended to eliminate plaintiff's contractual right to purchase 25% of corporation's authorized stock); 2) to redeem shares; *see, e.g.*, DEL. CODE ANN. tit. 8 § 243 (1975); 3) to merge or consolidate with other corporations; *see, e.g.*, CAL. CORP. CODE §§ 1100-03 (Deering 1977); 4) to sell or mortgage assets; *see, e.g.*, DEL. CODE ANN. tit. 8 § 272 (1975); 5) to complete a short form merger; *see, e.g.*, DEL. CODE ANN. tit. 8 § 253 (1975); and 6) to dissolve the corporation; *see, e.g.*, DEL. CODE ANN. tit. 8 § 275 (1975).

25. The persons holding a majority of the voting shares possess the power to elect all the directors. The directors determine corporate policy, select corporate officers, and supervise the operation of the corporation. Majority interests can deprive minority interests of any voice in the operation of the business. F. O'NEAL, *supra* note 4, § 1.03, at 3.

26. The business judgment rule grants broad discretion to directors to determine business policy and conduct corporate affairs. The rule is based on the following beliefs: (1) courts should not substitute their judgment for that of directors who were selected to manage the business; (2) courts are not qualified to make complex business decisions; and (3) shareholders should be discouraged from instituting frivolous litigation. F. O'NEAL, *supra* note 4, § 9.04, at 583. *See, e.g., In re* Reading Co., 711 F.2d 509 (3d Cir. 1983) (court will not disturb the judgment of a board of directors if the judgment has any rational business purpose); Willis v. Dillsburg Grain & Milling, 490 F. Supp. 46 (M.D. Pa. 1980) (court will not interfere with the internal business policies of a corporation absent a clear showing of fraud or abuse of discretion).

27. Some state statutes permit shareholders to petition for involuntary dissolution of a corporation. Involuntary dissolution refers to mandatory dissolution by court order rather than voluntary dissolution by a majority vote of shareholders. For an example of involuntary dissolution legislation, see MODEL BUSINESS CORP. ACT §§ 94-103 (1971). Courts, however, are reluctant to authorize dissolution of a corporation because its liquidation value is usually less than the value of the going business concern. *See* Patton v. Nicholas, 154 Tex. 385, 398, 279 S.W.2d 848, 857 (1955) ("[W]e agree with the practically unanimous judicial opinion that liquidation of solvent going corporations should be the extreme or ultimate remedy, involving as it usually will, accentuation of the economic waste incident to many receiverships and most forced sales.").

Many states also offer statutory alternatives to dissolution, authorizing the courts to cancel, alter, or enjoin acts of the corporation, shareholders, directors, or officers. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 10-216 (1977); CALIF. CORP. CODE § 1803 (Deering 1977); MICH. COMP. LAWS ANN. §§ 450-1825 (West 1974).

Several state statutes permit a judicially supervised buy-out of the minority shareholder's interest by the corporation or other shareholders. *See, e.g.*, ILL. REV. STAT. ch. 32, § 12.55 (1984); N.C. GEN. STAT. §§ 55-1251.1 (1975).

Most state statutes follow the Model Business Corporation Act to determine whether dissolution or alternative relief is appropriate. The Act focuses on "illegal, oppressive or fraudulent" actions of majority shareholders. MODEL BUSINESS CORP. ACT § 97 (1971). Courts interpret these statutes narrowly, usually requiring a finding of wrongful conduct prior to granting statutory relief. *See, e.g.*, Fix v. Fix Material Co., 538 S.W.2d 351 (Mo. App. 1976) (combination of provisions giving long-term management control to majority shareholder, heavy corporate losses, and salary increases to the majority deemed not oppressive). For similar holdings, see Notzke v. Art Gallery, Inc., 84 Ill.

Traditionally, however, the minority shareholder has limited recourse against the discharge from employment technique because of a common-law rule known as the employment-at-will rule.

II. EMPLOYMENT-AT-WILL RULE

A. Development and Legislative Limitations

The employment-at-will rule, which developed domestically,[28] grants an employer complete freedom to discharge any employee.[29] The courts adopted the rule to foster growth during the industrial revolution in the late nineteenth and early twentieth centuries.[30] During this period of laissez-faire economics, the rule seemed equitable.[31] The United States Supreme Court in *Adair v. United States*[32] and *Coppage v. Kansas*[33] held

App. 3d 294, 405 N.E.2d 839 (1980); Baker v. Commercial Body Builders, Inc., 264 Or. 614, 507 P.2d 387 (1973); White v. Perkins, 213 Va. 129, 189 S.E.2d 315 (1972).

28. For early cases applying the employment-at-will rule, see Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908); Haney v. Caldwell, 35 Ark. 156 (1879); Lord v. Goldberg, 81 Cal. 596, 22 P. 1126 (1889); Faulkner v. Des Moines Drug Co., 117 Iowa 120, 90 N.W. 585 (1902); McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 A. 176 (1887); Sullivan v. Detroit, Y. & A.A. Ry., 135 Mich. 661, 98 N.W. 756 (1904); Capron v. Strout, 11 Nev. 304 (1876).

See generally DeGuiseppe, *The Effect of the Employment at Will Rule on Employee Rights to Job Security and Fringe Benefits,* 10 FORDHAM URB. L.J. 1, 5-8 (1976); Note, *Judicial Limitations of the Employment-at-Will Doctrine,* 54 ST. JOHN'S L. REV. 552, 554-56 (1980).

29. *See* Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895). *See generally* Feinman, *The Development of the Employment-at-Will Rule,* 20 AM. J. LEGAL HIST. 118, 131-35 (1976); Note, *A Common Law Action for the Abusively Discharged Employee,* 26 HASTINGS L.J. 1435, 1440 (1975).

30. *See, e.g.,* Greer v. Arlington Mills Mfg., 17 Del. 581, 43 A. 609 (1899); Louisville, & N. R.R. v. Harvey, 99 Ky. 157, 34 S.W. 1069 (1896); Finger v. Koch & Schilling Brewing Co., 13 Mo. App. 310 (1883); Martin v. New York Life Ins., 148 N.Y. 117, 42 N.E. 416 (1895). *See generally* DeGuiseppe, *supra* note 28, at 7-8; Feinman, *supra* note 29, at 126.

31. The writers of this period insisted upon freedom of bargaining as a "fundamental and indispensable requisite of progress." Williston, *Freedom of Contract,* 6 CORNELL L.Q. 365, 366 (1921).

In Pitcher v. United Oil & Gas Syndicate, Inc., 174 La. 66, 139 So. 760 (1932), the court explained why an employment contract for an indefinite term would be terminable at will:

> An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself. . . . And if the contract of employment be not binding on the employee . . . then it cannot be binding upon the employer; there would be lack of "mutuality."

Id. at 67, 139 So. at 761.

For the assertion that the contract principles of mutuality of obligation and mutuality of consideration are no longer important, see Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?,* 23 B.C.L. REV. 329, 337 (1982).

32. 208 U.S. 161 (1908). In *Adair,* the Court struck down a federal statute that barred common carriers from dismissing employees for union membership. *Id.* at 168.

33. 236 U.S. 1 (1915). In *Coppage,* the Court invalidated a Kansas statute forbidding "yellow

the rule constitutional, stating that employers had the right to enter and terminate contracts and to acquire and hold property free from judicial and legislative restraints.[34]

In the era of recovery following the Depression, the development of a technologically advanced economy altered the roles of employers and employees. Employers wielded significantly greater bargaining power than employees.[35] Recognizing this disparity, the Supreme Court backed away from a strict employment-at-will rule.[36] In *NLRB v. Jones & Laughlin Steel Corp.*,[37] the Court upheld Congress' power to protect union activity, limiting employers' ability to discharge employees for union affiliation.[38]

Federal legislation further limited the employment-at-will rule, prohibiting employers from discriminating on the basis of race,[39] sex,[40]

---

dog" contracts. *Id.* at 6-7. A "yellow dog" contract is an agreement between an employer and employee that obligates the employee not to join or remain a member of a labor organization.

34. *Id.* at 23. The Court relied heavily on *Adair*, reasoning that each party had the right to stipulate the terms of the agreement relative to continuance of the employment relationship at the contract's inception.

35. The rapid expansion of the early American industrial economy initially created jobs at a rate sufficient to provide work for those displaced as a result of technological advances and to accomodate an increase in the size of the work force. This situation, however, was short-lived. Y. BRENNER, A SHORT HISTORY OF ECONOMIC PROGRESS 210-11 (1969). Inevitably, the number of qualified workers began to exceed the number of available positions. As a result, the employer acquired significant leverage in negotiating employment contracts. The inequality in bargaining position resulted in long hours and poor working conditions for the labor force. J. GALBRAITH, AMERICAN CAPITALISM 114-15 (1956).

Commentators argued that because of the imbalance in the employment relationship, the employment-at-will rule should be abolished. *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter cited as *Protecting Employees*].

More recently, however, commentators have defended the employment-at-will rule. *See, e.g.*, Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U.L.J. 881 (1983); Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201 (1982) [hereinafter cited as *Right to Terminate*].

36. *See* Virginia Ry. v. System Fed'n, 300 U.S. 515 (1937); Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930); Pennsylvania R.R. v. United States Ry. Labor Bd., 261 U.S. 72 (1923).

37. 301 U.S. 1 (1937).

38. *Id.* at 33.

39. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-2000e-17 (1982)). Under Title VII, an employer may not discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on account of the individual's race, color, religion, sex, or national origin.

40. *Id.*

age,[41] physical handicap,[42] or union activity.[43] Following the lead of Congress, many states passed statutes banning unjust dismissals in the areas of civil rights,[44] workers' compensation,[45] labor relations,[46] political activity,[47] jury duty,[48] health and safety,[49] and whistle blowing.[50]

B. Judicial Limitations on the Employment-At-Will Rule

Courts have also limited the employment-at-will rule,[51] developing a public policy exception[52] and imposing a good faith and fair dealing requirement in the employment relationship.[53]

---

41. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631, 633(a) (1982). The Act protects persons between the ages of 40 and 70 years from age discrimination by private employers, the federal government, and labor unions. The Act also protects workers from retaliatory discharge for exercising rights under the Act.

42. *See* Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982).

43. *See* National Labor Relations Act of 1935, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982). The Act prohibits an employer from discharging or discriminating against an employee for exercising his rights to participate in union activity, file charges, or give testimony under the Act.

44. *See, e.g.*, N.Y. EXEC. LAW § 296(1)(a)(e) (Consol. 1983).

45. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 8307(c) (Vernon Supp. 1984).

46. *See, e.g.*, CAL. GOV'T CODE § 3519(a) (Deering 1982).

47. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 56, § 33 (West 1978).

48. *See, e.g.*, N.Y. JUD. LAW § 532 (Consol. 1983).

49. *See, e.g.*, CAL. LAB. CODE § 6310 (Deering 1982 & Supp. 1985).

50. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 31-51 (West 1983).

51. For other miscellaneous theories relied on by discharged employees, see Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (interference with constitutionally protected free speech); Cotes v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982) (intentional interference with contract); Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mo. 1982) (negligence); American Road Serv. Co. v. Inmon, 394 So. 2d 361 (Ala. 1980) (intentional infliction of emotional distress); Ezekial v. Winkley, 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977) (rights of fair procedure); Hamlen v. Fairchilds Indus., Inc., 413 So. 2d 800 (Fla. Dist. Ct. App. 1982) (fraud); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (implied contract from employee handbooks and manuals); McCullough v. Certain Teed Products Corp., 70 A.D.2d 771, 417 N.Y.S.2d 353 (1979) (prima facie tort). *See generally* 3 L. LARSON, EMPLOYMENT DISCRIMINATION §§ 119.20-119.53 (1984).

52. Courts in the following 22 states have recognized the public policy exception: Arizona, Arkansas, California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Mexico, Oregon, Pennsylvania, Washington, West Virginia, and Wisconsin. *See* Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's,* 40 BUS. LAW. 1, 6 n.30 (1984).

53. State law in the following 18 states recognizes some form of wrongful discharge action for breach of an implied covenant of good faith: Alabama, Alaska, Arizona, California, Idaho, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Mexico, New York, Oklahoma, Oregon, South Dakota, and Washington. *Id.* at 17 n.92.

1. Public Policy Exception

The public policy exception is the most widely accepted judicial limitation on the employment-at-will rule.[54] The cases in jurisdictions that recognize this exception fall into three categories. First, some courts have refused to apply the employment-at-will rule when an employer discharges an employee for refusing to commit an unlawful or wrongful act.[55] Second, some courts have refused to apply the rule when an employer discharges an employee for exercising a statutory right.[56] Finally, some courts have refused to apply the rule when an employer discharges an employee for performing a public obligation.[57]

---

54. *See Protecting Employees, supra* note 35, at 1936; Comment, *Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort,* 13 CONN. L. REV. 617 (1981).

In order to invoke this exception, a showing must be made that the discharge involves public policy and not just private interests. Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977). In *Scroghan*, the court held that no public policy was involved when the employer fired an employee for announcing his intention to attend night law school contrary to the employer's wishes.

Other courts have denied wrongful discharge claims on the basis that mere private interests were at stake. *See, e.g.,* Daniel v. Magma Copper Co., 127 Ariz. App. 320, 620 P.2d 699 (1980) (threatening to sue employer for injury unrelated to work); Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977) (refusing to take a lie detector test); M.B.M. Co. v. Cource, 26 Ark. 269, 596 S.W.2d 681 (1980) (falsely accused of stealing from cash register); Patterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967) (falsely downgraded on job performance test); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (missing the company's Christmas fund); Abrisz v Pulley Freight Lines, 270 N.W.2d 454 (Iowa 1978) (questioning employer's integrity); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980) (questioning employer's internal management system); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979) (taking too much sick leave); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980) (cohabiting with co-employee while having an affair with a married employer).

In a majority of the jurisdictions that recognize the public policy exception, the cause of action is grounded in tort law. The rationale is that the employer's duty arises from public policy independent of the contract between the employer and employee. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 177, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 845 (1980); Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 480, 427 A.2d 385, 388-89 (1980). *Contra* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

A tort action is advantageous to a wrongfully discharged employee because tort law, unlike contract law, allows recovery of compensatory and punitive damages. *See* Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 383-85 (6th Cir. 1983); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186-90, 384 N.E.2d 353, 359-60 (1978). *But see* Smith v. Atlas Off-Shore Boat Serv., 653 F.2d 1057, 1064 (5th Cir. 1981) (disallowing punitive damages for the tort of wrongful discharge).

A tort action also provides a longer statute of limitations. *See, e.g.,* Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980).

55. *See infra* notes 58-61 and accompanying text.

56. *See infra* notes 62-66 and accompanying text.

57. *See infra* notes 67-70 and accompanying text.

Petermann v. International Brotherhood of Teamsters, Local 396[58] typifies the first category. In *Petermann*, the plaintiff alleged that his employer instructed him to commit perjury. When he refused, the employer discharged him.[59] The California Court of Appeals noted that although an employer generally has the right to terminate an employee-at-will, that right could be limited by public policy considerations.[60] The *Petermann* court viewed the discharge as retaliation against the employee for refusing to commit an act prohibited by statute. In order to effectuate the declared public policy behind the statute, the court limited the employer's power to terminate the employee-at-will.[61]

Frampton v. Central Indiana Gas Co.[62] illustrates the second category. In *Frampton*, the employee filed a workman's compensation claim for a job-related injury. After the employee received a settlement, the employer fired her in retaliation.[63] The court limited the employer's power to terminate the employee-at-will, concluding that fear of discharge may have a deleterious effect on an employee's exercise of a statutory right.[64] Other jurisdictions have disagreed whether discharging an employee in retaliation for filing a workman's compensation claim is actionable.[65]

58. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *But see* Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. App. 1981) (after retaliatory discharge of employee for testifying truthfully against her employer at an administrative proceeding, court denied petition for rehearing en banc).

59. 174 Cal. App. 2d at 185, 344 P.2d at 27.

60. *Id.* at 186, 344 P.2d at 27.

61. The California Supreme Court reaffirmed *Petermann* in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1333, 164 Cal. Rptr. 839 (1980).

Courts have upheld numerous causes of action for unjust dismissal when employees have refused to commit unlawful acts. *See* McNulty v. Borden, Inc., 474 F. Supp. 1387 (S.D. Ind. 1982) (refusal to participate in illegal price fixing scheme); Perry v. Hartz Mountain Corp., 527 F. Supp. 1387 (S.D. Ind. 1982) (refusal to violate antitrust laws); Crossen v. Foremost-McKesson, Inc., 537 F. Supp. 1076 (M.D. Cal. 1982) (refusal to engage in business practices abroad in violation of foreign, federal, and state laws); Trombetta v. Detroit, Tol. & I. R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to alter pollution control reports in violation of state law); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1978) (refusal to perform a medical procedure that the employee could not lawfully perform). *But see* Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976) (employer not liable for discharging employee for disputing false corporate representations to the federal government); Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (employer not liable for discharging employee for refusing to falsify medical records).

62. 260 Ind. 249, 297 N.E.2d 425 (1973).

63. *Id.* at 251, 297 N.E.2d at 427.

64. *Id.*

65. *Compare* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (retaliatory discharge actionable); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976) (actionable); Hansen v. Harrah's, 115 L.R.R.M. (BNA) 3024 (Nev. 1984) (actionable) *with* Thurston v. Mache Co., 716 F.2d 255 (4th Cir. 1983) (not actionable); Kelly v. Mississippi Gas Co., 397 So. 2d 874

Those courts that have refused to limit the employment-at-will rule insist that such causes of action are best created by the legislature.[66]

Palmateer v. International Harvester Co. exemplifies the third category.[67] In *Palmateer*, the employer discharged the employee for supplying law enforcement authorities with information concerning another employee's possible involvement in criminal activities.[68] The Illinois Supreme Court allowed the employee's wrongful discharge action,[69] holding that no public policy is more important than that favoring the effective protection of lives and property through enforcement of a state criminal code.[70]

2. *Implied Covenant of Good Faith*

Some courts have overridden the employment-at-will rule by imposing

(Miss. 1981) (not actionable); Bottijlso v. Hutchinson Fin., 96 N.M. 789, 635 P.2d 992 (App. 1981) (not actionable).

66. *See* Firestone Textile v. Meadows, 114 L.R.R.M. (BNA) 3559, 3561 (Ky. 1983); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 696, 316 N.W.2d 710, 712 (1982); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 577-79, 335 N.W. 2d 834, 841 (1983).

Some courts, however, have extended protection to employees who exercised statutory rights other than filing workers' compensation claims. *See, e.g.*, Perks v. Firestone Tire & Rubber, 611 F.2d 1363 (3d Cir. 1979) (right to refuse to take a polygraph test); Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (right to designate an attorney to negotiate terms of employment); Krystad v. Lau, 65 Wash. 2d 827, 400 P.2d 72 (1965) (en banc) (right to join a labor union).

But cf. Kavanagh v. KLM Royal Dutch Airlines, 566 F. Supp. 242 (N.D. Ill. 1983) (permissible discharge when employee hired attorney); Catania v. Eastern Airlines, 381 So. 2d 265 (Fla. App. 1980) (employee's nonunion or union status is not actionable despite state's right-to-work law).

67. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

68. *Id.* at 132, 421 N.E.2d at 879.

69. *Id.* at 133, 421 N.E.2d at 880. The court stated that "[n]o specific constitutional or statutory provision requires a citizen to take an active part in ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime fighters."

70. *Id.* Courts have applied this exception to other general public policies. *See, e.g.*, Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983) (discharge for being subpoenaed to testify before a grand jury violates public policy); Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980) (wrongful discharge of director who tried to correct false and misleading food labeling violates public policy); Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1982) (discharge of pharmacist who objected to unlawful plan to close the pharmacy violates public policy); Reuther v. Fowler & Williams Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (termination of employee for performing jury duty actionable).

But see Bender Ship Repair v. Stevens, 379 So. 2d 594 (Ala. 1980) (no cause of action when employer fined employee for serving on grand jury); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. App. 1980) (no cause of action when employee discharged for protest against dangerous drug and submission of erroneous drug data); Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981) (no cause of action when employee dismissed after exposing illegal and improper corporate conduct).

a duty of good faith and fair dealing in the employment relationship. In *Monge v. Beebe Rubber Co.*,[71] the seminal case imposing such a duty, the employer discharged the plaintiff, a female machine operator, when she refused to date her foreman.[72] In recognition of Monge's claim, the court stated that if an employer terminates an employee-at-will for reasons of bad faith, malice, or retaliation, the termination is not in the best interest of the public good and constitutes a breach of the employment contract.[73] Other jurisdictions recognizing the good faith doctrine typically apply it to cases in which the discharged employee has worked for the employer for a long period of time,[74] or in which the employer has deprived the employee of bonuses, wages, or commissions.[75]

III. PROTECTION OF MINORITY SHAREHOLDERS' REASONABLE EXPECTATIONS

Majority oppression statutes generally focus on the majority shareholders' oppressive acts to provide relief to minority shareholders. Recently, however, several courts have shifted the focus of their analysis under majority oppression statutes, examining minority shareholders' reasonable expectations to determine if majority oppression has occurred.[76] Similarly, several states have enacted new statutes that attempt

71. 114 N.H. 130, 316 A.2d 549 (1974).

72. *Id.* at 132, 316 A.2d at 550.

73. *Id.* at 133, 316 A.2d at 551. Although the court made this statement in regard to an implied covenant of good faith and fair dealing, many courts and commentators discuss the case under the public policy exception. *See generally* DeGuiseppe, *supra* note 28, at 26.

The New Hampshire Supreme Court subsequently limited the broad language it used in *Monge*. *See* Howard v. Door Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980) (holding that *Monge* would be applied only when an employer discharged an employee for performing an act that public policy would encourage or refusing to do an act that public policy would condemn).

74. *E.g.*, Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (court held longevity of employee's service was a significant factor in determining employer's liability for dismissal).

See also Chancellier v. Federated Dep't Stores, 672 F.2d 1312, 1318 (9th Cir. 1982) (holding that employees must allege longevity of service and the existence of personnel policies or oral representations showing an implied promise not to deal with employees arbitrarily).

75. In Fortune v. National Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977), the plaintiff, a salesman with forty years of experience, alleged that his employer discharged him to avoid awarding commission on a five million dollar sale. The Supreme Court of Massachusetts held that an implied covenant of good faith existed in this particular case but refused to imply such a duty in every employment contract. *See also* Gram v. Liberty Mut. Ins., 391 Mass. 333, 461 N.E.2d 796 (1984) (upholding employee's right to receive commission after wrongful discharge).

76. *See* O'Donnel v. Marine Repair Servs., 530 F. Supp. 1199, 1201 (S.D.N.Y. 1982); *In re* Taines, 111 Misc. 2d 559, 562-63, 444 N.Y.S.2d 540, 543-44 (1981); *In re* Topper, 107 Misc. 2d 25,

to protect the rights and interests of the minority shareholder.[77] Courts have interpreted these new statutes to provide relief if conduct by the majority breaches the reasonable expectations of the minority shareholder.[78]

For example, in *In Re Topper*,[79] Topper held a one-third interest in two corporations. Topper, who had invested his life savings in the corporations, relocated from Florida to New York and terminated his previous employment of twenty-five years in order to serve as an officer and employee of the two corporations.[80] The majority shareholders who controlled the two companies removed Topper from his positions as officer and employee, terminated his salary, and changed the locks on the corporate offices.[81] Applying a reasonable expectations test,[82] the court found

---

28, 433 N.Y.S.2d 359, 362 (Sup. Ct. Spec. Term 1980); *see also Rights of Minority Shareholders, supra* note 7, at 1009-12.

77. *See, e.g.*, CAL. CORP. CODE § 1800(b)(5) (Deering 1977); N.J. STAT. ANN. § 14:12-7 (West Supp. 1984); N.Y. BUS. CORP. LAW § 1104-a(b)(2) (Consol. 1983); N.C. GEN. STAT. § 55-125(a)(4) (1982).

In 1983 Minnesota adopted ground-breaking legislation that specifically provides that shareholders' reasonable expectations should be considered in determining relief in a shareholder controversy. *See* MINN. STAT. ANN. § 302A.751(3)(a) (West 1984). The statute reads as follows:

> In determining whether to order equitable relief, dissolution, or a buy-out, the court shall take into consideration the duty which all shareholders in a closely-held corporation owe one another to act in honest, fair, and reasonable manner in the operation and *the reasonable expectations of the shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other.*

Id. (emphasis added).

For a discussion of the amendments to the Minnesota Act, see Olson, *Statutory Changes Improve Position of Minority Shareholders in Closely-Held Corporations,* Hennepin Law. 10 (Sept.-Oct. 1983).

78. In Exadaktilos v. Cinnaminson Realty, 167 N.J. Super. 141, 400 A.2d 554 (1979), *aff'd,* 173 N.J. Super. 559, 414 A.2d 994 (1980), the court recognized the minority shareholder's reasonable expectation that he would someday participate in managing the company restaurant. The court, however, refused to award dissolution, finding that the minority shareholder's failure to learn the business frustrated his reasonable expectation. The court held that the minority shareholder's discharge was not oppressive.

The California Court of Appeals took a somewhat different approach in Stumpf v. C.E. Stumpf & Sons, 47 Cal. App. 3d 230, 120 Cal. Rptr. 671 (1975). In *Stumpf,* hostility existed between two brothers, each of whom owned a one-third interest in a family corporation. After one brother severed ties with the family, the family limited his voice in the operation of the business and denied his salary and dividends. The court held that these actions failed to qualify as oppressive within the meaning of the statute, but ordered dissolution under the minority interest provision of the statute to "assure fairness to minority shareholders." *Id.*

79. 107 Misc. 2d 25, 433 N.Y.S.2d 359 (Sup. Ct. Spec. Term 1980).

80. *Id.* at 27, 433 N.Y.S.2d at 361-62.

81. *Id.*

82. *Id.* at 31, 433 N.Y.S.2d at 365. The court cited Professor O'Neal's treatise, *supra* note 4, which states the underlying principle of the reasonable expectations test as follows:

that the majority's squeeze-out destroyed Topper's reasonable expectation of actively participating in the corporations, thereby oppressing him within the meaning of the statute. The court ordered the majority shareholders to buy out Topper's interest, noting that the reasonable expectations of minority shareholders constitute part of the bargain between shareholders when they form a corporation.[83]

In *Meiselman v. Meiselman*,[84] the Supreme Court of North Carolina held that the minority shareholder's rights and interests in a close corporation include his reasonable expectations.[85] In *Meiselman*, two brothers, Ira and Michael Meiselman, owned shares and served as employees in several corporations founded by their father.[86] Ira, however, held a majority of the shares in the corporations.[87] Michael brought a derivative suit alleging that Ira caused one corporation to enter into an unfair management contract with another company solely owned by Ira.[88] Ira discharged Michael from employment in the family businesses in retaliation for Michael's suit.[89]

Michael sought relief under the state's majority oppression statute that required liquidation to be "reasonably necessary" to protect the "rights or interests" of a complaining minority shareholder.[90] The supreme court declined to decide whether dissolution was reasonably necessary

---

> [I]n a corporation based on a personal relationship a court should give relief, dissolution or some other remedy, to a minority shareholder whenever corporate managers or controlling shareholders act in a way that disappoints the minority shareholders' reasonable expectations, even though the acts of the managers or controlling shareholders fall within the literal scope of powers or rights granted them by the corporation act or the corporation's bylaws.

F. O'NEAL, *supra* note 4, at § 7.15.

For a discussion of the *Topper* case, see Davidian, *supra* note 20, at 48-56; Valenti, *Business Associations*, 33 SYRACUSE L. REV. 11, 11-15 (1982).

83. 107 Misc. 2d at 31, 433 N.Y.S.2d at 365. The court ordered the majority shareholders to buy out the shares of the minority pursuant to N.Y. BUS. CORP. LAW § 1118 (Consol. 1983). *Id.* at 28-29, 433 N.Y.S.2d at 362.

84. 309 N.C. 279, 307 S.E.2d 551 (1983).

85. *Id.* at 291, 307 S.E.2d at 563. In *Meiselman*, the plaintiff brought suit under N.C. GEN. STAT. § 55-125(a)(4) (1982), which provides for dissolution or another more appropriate remedy when "reasonably necessary" for the protection of the "right or interests" of the complaining shareholder.

86. 309 N.C. at 282, 307 S.E.2d at 553.

87. *Id.* at 282-83, 307 S.E.2d at 553-54. Ira owned a 70% interest and Michael owned a 30% interest.

88. *Id.* at 283, 307 S.E.2d at 554.

89. *Id.* Ira also took Michael's company car, his hospital and life insurance, his corporate credit cards, and his interest in a profit-sharing trust. *Id.*

90. *Id.* at 282, 307 S.E.2d at 552-53.

because the trial court failed to determine Michael's rights or interests.[91] In instructions to the trial court for consideration on remand, the supreme court stated that a complaining shareholder's rights or interests in a close corporation include his reasonable expectations in the corporation.[92] The court explained that in ascertaining these reasonable expectations, the trial court must consider expectations generated during the entire relationship between the shareholder and the corporation, not just expectations existing at the inception of this relationship.[93]

IV. PROPOSED INVOLUNTARY DISSOLUTION AND ALTERNATIVE RELIEF STATUTE

Although all states have enacted statutes giving courts the power to dissolve corporations, neither these statutes nor the case law provides uniform standards to determine when a minority shareholder may obtain dissolution or alternative relief.[94] Because oppressive conduct occurs in an infinite variety of forms and circumstances,[95] a statute specifically defining oppressive conduct would be underinclusive.[96] Likewise, an overbroad statute may injure both majority and minority shareholders.[97]

This Note proposes a flexible involuntary dissolution and alternative relief statute for shareholders in close corporations. The proposed statute seeks to insure equitable results by defining acceptable majority

91. *Id.* at 291, 307 S.E.2d at 563.

92. *Id.*

93. *Id.* Professor O'Neal adopts a similar view: "[A] court should examine the whole history of the participant's relationship as expectations alter and new expectations develop over the course of the participants' cooperative efforts in operating the business." F. O'NEAL, *supra* note 4, § 7.15 at 527.

94. *See supra* notes 27 & 76-77 and accompanying text. *See also* Davidian, *supra* note 20, at 59.

95. *See supra* notes 12-14 & 22-24 and accompanying text.

96. In Fix v. Fix Material Co., 538 S.W.2d 351 (Mo. Ct. App. 1976), the court, commenting on judicial definition of "oppression," stated: "Such definitions are suggested perimeters of the broad term rather than narrow definitions which would tend to rob the term of its useful flexibility. As we read the statute, it is intended the courts will proceed on a case-by-case basis." *Id.* at 358. *See also* Davidian, *supra* note 20, at 59.

97. *See* Note, *Corporate Dissolution for Illegal Oppressive or Fraudulent Acts: The Maryland Solution*, 28 MD. L. REV. 360, 372 (1968). The directors and controlling shareholders may be forced to make their business judgments with a view toward avoiding violating a vague standard rather than serving the best interests of the corporation. The possibility of broad judicial construction may also discourage new companies from selecting the particular state as their state of incorporation. *Id.* at 362.

A vague statute will also harm the minority shareholders' interests because of the court's recognition of the business judgment rule and the right of majority control. *See supra* notes 25-26 and accompanying text.

shareholder conduct according to the reasonable expectations of the minority shareholder.[98] The proposed statute clarifies the level of oppression that would warrant judicial relief by reflecting investment realities in a close corporation.[99]

The proposed statute reads as follows:

Involuntary dissolution; alternative relief

(1) In the case of a close corporation having 35 shareholders or less, a court may order dissolution or grant any alternative relief under this section in an action brought by one or more directors or one or more shareholders upon proof that those in control of the corporation have

(a) acted fraudulently or illegally;

(b) mismanaged the corporation; or

(c) violated the strict good faith fiduciary duty that shareholders in a close corporation owe one another by frustrating the reasonable expectations of one or more shareholders.[100]

(2) A court shall take the following into account when determining the reasonable expectations of a shareholder:

(a) the reasonable expectations of a shareholder existing at the time of incorporation and those developing during the shareholder's participation in the corporation;[101]

(b) the reasonable expectations of a shareholder to serve as an employee, officer or director of the corporation.[102]

This proposed statute would enable courts to grant relief to minority shareholders despite traditional principles such as majority rule, the busi-

98. *See supra* notes 76-93 and accompanying text.

99. *See* Exadaktilos v. Cinnaminson Realty, 167 N.J. Super. 141, 400 A.2d 554 (1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (1980). The special circumstances, arrangements and personal relationships that frequently underlie the formation of close corporations generate certain expectations among the shareholders concerning their respective roles in corporate affairs, including management and earnings. These expectations preclude the drawing of any conclusions about the impact of a particular course of corporate conduct on a shareholder without taking into consideration the role that he is expected to play.

167 N.J. Super. at 154-55, 400 A.2d at 561. *See also supra* note 21 and accompanying text.

100. *See* MINN. STAT. ANN. § 302A.751(3)(a) (West 1984). *See generally* Olson, *supra* note 77, at 10.

101. *See supra* note 93 and accompanying text.

102. For a similar provision, see N.J. STAT. ANN. 14A:12-7(1)(c) (West Supp. 1984-85). The Commissioner's comment to this New Jersey statute states that "the additional words [whether in his capacity as a shareholder, director, or employee of the corporation] reflect the fact in a closely-held corporation oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices . . . in the absence the courts might feel constrained to look exclusively to direct injury to the shareholders' stock interest." N.J. STAT. ANN. 14A:12-7(1)(c), comment (West Supp. 1984-85).

ness judgment rule, and the employment-at-will rule. First, the proposed statute would limit the exercise of majority control by imposing a strict good faith fiduciary duty upon the shareholders.[103] This concept was illustrated in *Wilkes v. Springside Nursing Home.*[104] In *Wilkes*, the Supreme Judicial Court of Massachusetts held that the removal of Wilkes as a salaried officer and director breached the fiduciary duties of utmost good faith and loyalty owed him by the other shareholders in the close corporation.[105] The court allowed Wilkes to recover the salary he would have received had he remained an officer and director.[106] The court stated that minority shareholders expect to participate in corporate management.[107] Thus, the general corporate law's reliance on the principle of majority rule, which presumes that the minority shareholder consents to corporate policies as determined by the majority, conflicts with the realities of investor expectations in a close corporation.[108] Therefore, little justification exists to extend the principle of majority rule to a close corporation.

Second, the proposed statute would limit the exercise of the business judgment rule. As an example, the New Jersey Superior Court, in *Exadaktilos v. Cinnaminson Realty*,[109] adopted the reasonable expectations test and noted that the business judgment rule should not apply because the rule enables majority shareholders to abuse their authority at the minority's expense.[110] The business judgment rule is based on premises inconsistent with the special characteristics of close corporations.[111]

---

103. *See Involuntary Dissolution, supra* note 9, at 1140-41.

104. 370 Mass. 842, 353 N.E.2d 657 (1976).

105. *Id.* at 848, 352 N.E.2d at 661. The court defined the fiduciary duty as substantially the same fiduciary duty that partners owe to one another, a duty of utmost good faith and loyalty. *Id.*

106. *Id.* at 851, 353 N.E.2d at 662-63.

107. *See supra* note 13 and accompanying text.

108. *See, e.g.*, Notzke v. Art Gallery, Inc., 84 Ill. App. 3d 294, 405 N.E.2d 839 (1980) (minority shareholder expected to manage corporation's cocktail lounge); Compton v. Paul K. Harding Realty, 6 Ill. App. 3d 488, 285 N.E.2d 574 (1972) (minority shareholder expected to participate in management of corporation's real estate business); Capitol Toyota v. Gerwin, 381 So. 2d 1038 (Miss. 1980) (plaintiff expected to manage car dealership).

109. 167 N.J. Super. 141, 400 A.2d 554 (Law Div. 1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (App. Div. 1980).

110. *Id.* at 154, 400 A.2d at 561. In *Exadaktilos*, the court held that the minority shareholder's expectation to participate in management was frustrated by his own failure to learn the business. The majority, therefore, had a legitimate business purpose for discharging the minority shareholder and did not act oppressively. *Id.* at 155-56, 400 A.2d at 526.

111. *See supra* notes 20, 21 & 26 and accompanying text; F. O'NEAL, *supra* note 4, § 9.04, at 583 n.7.

Even though a majority shareholder has been selected a director, the minority shareholder still has a reasonable expectation to participate in management. This expectation justifies courts substituting their judgment for that of the controlling directors.[112] Moreover, in a close corporation, the decisions facing directors are not as complex as those facing directors in public corporations and are well within the scope of judicial understanding.[113]

Section (2)(a) emphasizes the expectations generated by the original business bargain but also recognizes the need to examine the entire history of the employer-employee relationship.[114] This section, therefore, provides courts flexibility to consider the changing expectations that develop over the course of the shareholder's participation in the business.[115]

Third, the proposed statute would limit the exercise of the employment-at-will rule by enabling courts to grant relief according to the minority shareholder's reasonable employment expectations.[116] Like most employees today, minority shareholders in close corporations depend on their corporate employers for economic survival.[117] Because minority shareholders expect continued employment, courts could provide relief for wrongful discharge under the proposed statute. This statutory relief addresses the concerns of those courts that refuse to permit a wrongful discharge action absent legislative approval.[118]

The potential plaintiff pool for wrongful discharge actions under the proposed statute would be limited. Because the statutory exception to the employment-at-will rule would be narrow, most employees would remain subject to the rule. Therefore, the proposed statute would not encourage wrongful discharge litigation. In addition, the proposed statute

112. *See supra* notes 13, 14 & 78-92 and accompanying text.

113. *See* F. O'NEAL, *supra* note 4, § 9.04, at 584; *Involuntary Dissolution, supra* note 9, at 1150.

114. *See supra* note 93 and accompanying text.

115. Professor Olson has discussed a similar provision, MINN. STAT. ANN. § 302A.751 (West 1984): "While certain expectations are probably common to all noncontrolling shareholders, the reasonable expectations of a particular shareholder will vary depending on the circumstances and the nature of the corporation. . . . An examination of the assumptions and expectations of the parties will allow the court to determine when and in what form that return [on his capital] should be made." Olson, *supra* note 77, at 23.

116. Under the proposed statute, courts could apply a public policy exception to the employment-at-will rule. The second classification of the public policy exception, discharge of an employee for exercising a statutory right, would cover a shareholder's reasonable employment expectation as recognized by the proposed statute. *See supra* notes 62-66 and accompanying text.

117. *See supra* notes 13-14 and accompanying text.

118. *See, e.g.*, cases cited *supra* note 66.

would limit excessive damage awards by protecting only reasonable employment expectations.[119] Because of the inherent personal characteristics of a close corporation, juries would not perceive the litigation as pitting a terminated shareholder employee against a large, impersonal corporation.[120]

Courts often justify their reluctance to grant dissolution by stating that dissolution may have an adverse effect on the community, eliminating jobs and depriving consumers of a viable business.[121] The proposed statute, however, would not necessarily result in dissolution of the corporation. Section (1) would give courts authority to order dissolution or to grant any alternative relief.[122] Courts would consider all the facts and circumstances of each case in determining the appropriate form of relief.[123] Thus, courts could require the controlling shareholders to buy out an oppressed shareholder, thereby avoiding interruption in business operations. Prospective investors would be encouraged to invest in close corporations knowing that they would not become locked into the corporation without recourse against the majority shareholders.[124]

V. CONCLUSION

By imposing an obligation of utmost good faith, the proposed statute would protect minority shareholders from the harsh results of majority rule. Likewise, the incorporation of the reasonable expectations test

119. For examples of jury verdicts exceeding one million dollars, see Chancellor v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982) ($1.9 million actual and punitive damages plus $400,000 in attorney's fees for three executives), *cert. denied,* 459 U.S. 859 (1983); McGrath v. Zenith Radio, 651 F.2d 458 (7th Cir.) ($1.3 million actual and punitive damages after remittitur to single employee), *cert. denied,* 454 U.S. 835 (1981).

120. Commentators who argue for revision or abolition of the employment-at-will rule fail to address the problem that juries may sympathize with the employee, a common man, when management dismisses him. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's,* 40 BUS. LAW. 1, 3-4 (1984).

121. *See, e.g.,* Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 125 (N.D. Ala. 1968); *see also* Hetherington & Dooley, *supra* note 3, at 27.

122. For possible alternative remedial measures, see Baker v. Commercial Body Builders, Inc., 264 Or. 614, 632-33, 507 P.2d 387, 395-96 (1973); Masinter v. Webco, Co., 262 S.E.2d 433, 441 n.12 (W. Va. 1980); Proposed Statutory Close Corporation Supplement to the Model Business Corporation Act, § 16, Report of the Committee on Corporate Laws, Section of Corporation, Banking and Business Law, American Bar Association, *reprinted in* 36 BUS. LAW. 269 (1981). *See generally* F. O'NEAL, *supra* note 4, § 9.05, at 587-97.

123. *See* Olson, *supra* note 77, at 19. "The court's remedial discretion is without statutory limit. . . . The relief granted should be proportioned to the degree of mistreatment that has been suffered by the non-controlling shareholder." *Id.*

124. *See Involuntary Dissolution, supra* note 9, at 1151.

would temper the application of the business judgment rule. Finally, the proposed statute would recognize the minority shareholder's reasonable employment expectation and would create a narrow public policy exception to the employment-at-will rule. The proposed involuntary dissolution and alternative relief statute would afford minority shareholders greater relief and would effectively balance the minority shareholder's interests with those of the majority.

Russell D. Phillips, Jr.